



## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R4-ES-2019-0018; FF09E22000 FXES1113090FEDR 223]

RIN 1018-BE09

### Endangered and Threatened Wildlife and Plants; Reclassification of the Red-Cockaded Woodpecker From Endangered to Threatened With a Section 4(d) Rule

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; revisions and reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our October 8, 2020, proposed rule to reclassify the red-cockaded woodpecker (*Dryobates borealis*) as a threatened species with a rule issued under section 4(d) of the Endangered Species Act of 1973 (Act), as amended. This action will allow all interested parties the opportunity to comment on the revised proposed section 4(d) rule language set forth in this document, which addresses concerns raised in the public comments we received on the October 8, 2020, proposed rule. Comments previously submitted on the proposed reclassification of the red-cockaded woodpecker and previously proposed section 4(d) rule need not be resubmitted, as they will be fully considered in preparation of the final determination.

**DATES:** The public comment period on the proposed rule that published on October 8, 2020, at 85 FR 63474, is reopened. We will accept comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

**ADDRESSES:** You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<https://www.regulations.gov>. In the Search box, enter FWS-R4-ES-2019-0018, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on “Comment.”

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R4-ES-2019-0018, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Information Requested**, below, for more information).

*Availability of supporting materials:* This document and supporting materials (including the species status assessment report and references cited) are available at <https://www.regulations.gov> under Docket No. FWS-R4-ES-2019-0018 and at the Southeast Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

**FOR FURTHER INFORMATION CONTACT:** Aaron Valenta, Chief, Division of Restoration and Recovery, U.S. Fish and Wildlife Service, Southeast Regional Office, 1875 Century Boulevard, Atlanta, GA 30345; telephone 404–679–4144. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

## **SUPPLEMENTARY INFORMATION:**

### **Information Requested**

We intend that any final action resulting from the October 8, 2020, and this

proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments and information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested party concerning these proposed rules.

We particularly seek comments or information on regulations that are necessary and advisable for the conservation and management of the red-cockaded woodpecker, including whether the measures outlined in this document for the revised proposed section 4(d) rule are necessary and advisable for the conservation of the red-cockaded woodpecker. Specifically, we seek comments on:

(1) Whether the included prohibitions in the revised proposed section 4(d) rule would adequately and appropriately provide for the conservation of the red-cockaded woodpecker;

(2) Whether it is appropriate to except incidental take that results from red-cockaded woodpecker management and military training activities on Department of Defense (DoD) installations with a Service-approved integrated natural resources management plan (INRMP);

(3) Whether different or additional conditions, if any, should be applied to the exception for DoD installations in order to provide adequately for the conservation of the red-cockaded woodpecker;

(4) Whether it is appropriate to except incidental take that results from habitat management activities intended to restore or maintain red-cockaded woodpecker habitat on Federal land management agency properties;

(5) Whether different or additional conditions, if any, should be applied to the exception for Federal land management agency properties in order to provide adequately for the conservation of the red-cockaded woodpecker;

(6) Whether it is appropriate to except incidental take associated with prescribed

burns and the application of herbicides on private lands when compatible with maintaining any known red-cockaded woodpecker populations;

(7) Whether different or additional conditions, if any, should be applied to the exception for prescribed burns and the application of herbicides on private lands in order to provide adequately for the conservation of the red-cockaded woodpecker;

(8) Whether it is appropriate to except incidental take that results from the installation of artificial cavity inserts and drilled cavities on public and private lands;

(9) Whether different or additional conditions, if any, should be applied to the exception for the installation of artificial cavities in order to provide adequately for the conservation of the red-cockaded woodpecker;

(10) Whether we should provide additional clarity on the minimum diameter of trees that are appropriate for selection for installation of artificial cavities and, if so, what the best available science indicates regarding a universally applicable minimum tree diameter;

(11) Whether any other forms of take should be excepted from the prohibitions in the revised proposed section 4(d) rule;

(12) Whether there are additional provisions the Service may wish to consider for the section 4(d) rule in order to conserve, recover, and manage the red-cockaded woodpecker; and

(13) Whether or how the Service could provide additional guidance or methods to streamline the implementation of the proposed section 4(d) rule for the red-cockaded woodpecker.

If you submitted comments or information on the October 8, 2020, proposed rule (85 FR 63474) during the comment period that was open from October 8, 2020, to December 7, 2020, please do not resubmit these comments. Any such comments are already part of the public record of this rulemaking proceeding, and we will fully

consider them in the preparation of our final determination. Our final determination will take into consideration all written comments and any additional information we receive during both comment periods.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the basis of the best scientific and commercial data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <https://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <https://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <https://www.regulations.gov>.

The final decision may differ from this revised proposed rule, based on our review of all information we receive during this rulemaking proceeding, including both comment periods. We may change the parameters of the prohibitions or the exceptions to those

prohibitions in this proposed section 4(d) rule if we conclude it is appropriate in light of comments and new information received. For example, we may establish additional exceptions to the prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the species. We may also expand the prohibitions to include prohibiting additional activities if we conclude that those additional activities are not compatible with conservation of the species.

## **Background**

We will only discuss those topics directly relevant to the revisions we are proposing to the section 4(d) rule in this document. For more information on the species, its habitat, and previous Federal actions concerning the red-cockaded woodpecker, refer to the proposed rule published in the *Federal Register* on October 8, 2020 (85 FR 63474).

In our October 8, 2020, proposed rule, we proposed to reclassify the red-cockaded woodpecker as a threatened species with a section 4(d) rule that provided specific prohibitions and exceptions that we determined necessary and advisable for the conservation of the red-cockaded woodpecker. These originally proposed prohibitions included prohibiting incidental take resulting from damage or conversion of currently occupied red-cockaded woodpecker nesting and foraging habitat to other land uses that results in conditions not able to support red-cockaded woodpeckers; forest management practices in currently occupied red-cockaded woodpecker nesting and foraging habitat; operation of vehicles or mechanical equipment, the use of floodlights, activities with a human presence, other actions associated with construction and repair, or extraction activities in an active cavity tree cluster during the red-cockaded woodpecker breeding season; installation of artificial cavity inserts, drilled cavities, or cavity restrictor plates; inspecting cavity contents, including, but not limited to, use of video scopes, drop lights, or mirrors inserted into cavities; activities that render active cavity trees unusable to red-cockaded woodpeckers; and the use of insecticide or herbicide on any standing pine tree

within 0.50-mile from the center of an active cavity tree cluster of red-cockaded woodpeckers (85 FR 63498, October 8, 2020).

The species-specific exceptions in the October 8, 2020, proposed rule included excepting incidental take caused by red-cockaded woodpecker management and military training activities on DoD installations with a Service-approved INRMP; habitat restoration activities carried out in accordance with a management plan providing for red-cockaded woodpecker conservation developed in coordination with, and approved by, the Service or a State conservation agency; and operation of vehicles or mechanical equipment, the use of lights at night, or activities with a human presence in active cavity tree cluster during the red-cockaded woodpecker breeding season, under some circumstances.

We accepted comments on the October 8, 2020, proposed rule for 60 days, ending December 7, 2020. The public comments we received during that public comment period indicated significant confusion regarding the intent of the Service's proposed section 4(d) rule and how it could impact activities that may affect the red-cockaded woodpecker.

Based on these comments, we propose a revised section 4(d) rule for the red-cockaded woodpecker. We request public comments on the revised proposed section 4(d) rule set forth in this document. We will provide a more detailed response to all of the comments we have already received on the October 8, 2020, proposed rule in our final determination; however, our revisions in this document generally address the overarching comments and concerns we received from the public regarding the proposed section 4(d) rule set forth in the October 8, 2020, proposed rule.

## **New Information and Revisions to Proposed 4(d) Rule**

### *Background*

Section 4(d) of the Act contains two sentences. The first sentence states that the Secretary of the Interior (Secretary) shall issue such regulations as she deems necessary

and advisable to provide for the conservation of species listed as threatened. The U.S. Supreme Court has noted that statutory language like “necessary and advisable” demonstrates a large degree of deference to the agency (see *Webster v. Doe*, 486 U.S. 592 (1988)). Conservation is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Additionally, the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or 9(a)(2), in the case of plants. Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary’s discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife or included a limited taking prohibition (see *Alsea Valley Alliance v. Lautenbacher*, 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council v. National Marine Fisheries Service*, 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld section 4(d) rules that do not address all the threats a species faces (see *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, “once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him [or her] with regard to the permitted activities for those species. [S]he may, for example, permit taking, but not importation of



such species, or [s]he may choose to forbid both taking and importation but allow the transportation of such species” (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

In practice, consistent with the two sentences in section 4(d), the Secretary has two mechanisms to provide for the conservation of threatened species in a section 4(d) rule. One mechanism is to promulgate prohibitions similar to those in section 9 of the Act. As discussed above, section 4(d) grants particularly broad discretion to the Service for prohibiting acts discussed in section 9. As noted in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, this “second sentence gives [the Service] discretion to apply any or all of the [section 9] prohibitions to threatened species without obliging it to support such actions with findings of necessity,” because “[o]nly the first sentence ... contains the ‘necessary and advisable’ language and mandates formal individualized findings” (*Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993), *modified on other grounds on reh’g*, 17 F.3d 1463 (D.C. Cir. 1994), *rev’d on other grounds*, 515 U.S. 687 (1995)).

Secondly, section 4(d) provides the Secretary discretion to issue such regulations as she deems necessary and advisable to provide for the conservation of species listed as threatened. Therefore, in addition to prohibiting relevant forms of take, section 4(d) rules can allow other forms of take by excepting this take from the prohibitions. These exceptions can encourage managers to pursue activities that benefit the species but that might result in take, especially if this take would not result in considerable detrimental effects to the species. If the Service excepts take associated with these beneficial activities in a section 4(d) rule, managers can implement these activities without fear of violating section 9 of the Act, even if take occurs.

Exercising this authority under section 4(d) of the Act, we have developed revisions to the proposed section 4(d) rule that are designed to address the red-cockaded woodpecker’s specific threats and conservation needs. Although the statute does not

require us to make a “necessary and advisable” finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the red-cockaded woodpecker.

As the Service concluded in its October 8, 2020, proposed rule to reclassify the red-cockaded woodpecker from endangered to threatened (85 FR 63474), the red-cockaded woodpecker is likely to become in danger of extinction within the foreseeable future primarily due to threats stemming from lack of suitable habitat. Given these threats, the intent of this revised proposed section 4(d) rule is to enhance population resiliency and to make it easier to carry out the habitat and species management activities that enhance the availability of the species’ key habitat and resource needs, which are outlined in the red-cockaded woodpecker’s species status assessment (SSA) report (U.S. Fish and Wildlife Service (USFWS) 2020a, pp. 74–87). This means that this proposed section 4(d) rule would prohibit take to protect the species, while also providing exceptions to these take prohibitions to encourage necessary and beneficial habitat restoration and species’ management to advance recovery.

The red-cockaded woodpecker requires cavity trees, nesting habitat, and foraging habitat (USFWS 2020a, pp. 81–85). Red-cockaded woodpeckers rely on cavities for nesting and roosting (USFWS 2020a, p. 31). Old pines are required as cavity trees because cavity chambers must be completely within the heartwood to prevent pine resin in the sapwood from entering the chamber and because heartwood diameter is a function of tree age (Jackson and Jackson 1986, pp. 319–320; Clark 1993, pp. 621–626; USFWS 2020a, p. 30). In addition, old pines have a higher incidence of the heartwood decay that greatly facilitates cavity excavation (USFWS 2020a, p. 30). As we explain in the 2003 red-cockaded woodpecker recovery plan, given that the species requires these cavities to complete its life cycle, the number of suitable cavities available can limit population size

(USFWS 2003, p. 20); thus, the recovery plan states, “to prevent loss of occupied territories, existing cavity trees should be protected, so that a sufficient number of suitable ones are maintained at all times” (USFWS 2003, p. 20).

Red-cockaded woodpeckers also require open pine woodlands and savannahs with large old pines for nesting and roosting (i.e., nesting habitat) (USFWS 2020a, p. 30). Cavity trees, with rare exception, occur in open stands with little or no hardwood midstory and few or no overstory hardwoods (USFWS 2020a, p. 30). Suitable foraging habitat generally consists of mature pines with an open canopy, low densities of small pines, a sparse hardwood or pine midstory, few or no overstory hardwoods, and abundant native bunchgrass and forb groundcovers (USFWS 2020a, p. 39).

Additionally, the red-cockaded woodpecker is a conservation-reliant species “highly dependent on active conservation management with prescribed fire, beneficial and compatible silvicultural methods to regulate forest composition and structure, the provision of artificial cavities where natural cavities are insufficient, translocation to sustain and increase small vulnerable populations, and effective monitoring to identify limiting biological and habitat factors for management” (USFWS 2020a, p. 129). The proposed rule to downlist the red-cockaded woodpecker from endangered to threatened emphasized this conservation reliance and indicated that the future persistence of the species will require these management actions to continue (85 FR 63474; October 8, 2020). As such, in addition to providing prohibitions necessary to protect individuals, the revised proposed section 4(d) rule provides exceptions that would maintain and restore these essential nesting and foraging resources for the species (i.e., cavity trees, nesting habitat, and foraging habitat), which will advance the species’ recovery and conservation.

Specifically, the exceptions in the revised proposed section 4(d) rule encourage beneficial habitat management on Federal lands, compatible prescribed burns and use of herbicides on private lands, and the provision of artificial cavities throughout the species’

range. These activities provide considerable benefit to the species and its habitat by maintaining or increasing the quantity and quality of cavity trees, nesting habitat, and foraging habitat. Additionally, this revised proposed 4(d) rule retains the proposed exception for take that results from activities authorized by a permit under the Act, which includes permits we have issued or will issue under the valuable safe harbor agreement program. Together, these prohibitions and exceptions would maintain and restore essential nesting and foraging resources for the species, improving the availability of suitable habitat, and would promote continued recovery.

Additionally, one of the primary purposes of the Act is to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved (16 U.S.C. 1531(b)); crafting a section 4(d) rule for red-cockaded woodpecker that encourages habitat management that benefits the species would also support conservation of the native pine-grass ecosystems upon which the species depends.

The provisions of this revised proposed 4(d) rule would promote conservation of the red-cockaded woodpecker by prohibiting take that can directly or indirectly impact population demographics. It would also promote conservation of the species by providing more flexibility for incidental take that may result from activities that maintain and restore requisite habitat features.

Moreover, we acknowledge and commend the accomplishments of our Federal partners, State agencies, nongovernmental organizations, and private landowners in providing conservation for the red-cockaded woodpecker for the past four decades. This intensive management has facilitated population growth since the time of listing, thereby allowing the Service to propose downlisting the species from endangered to threatened. Private landowners' safe harbor agreements, DoD's INRMPs, U.S. Forest Service land and resource management plans (LRMPs), and National Wildlife Refuge System habitat management plans currently provide specific measures for the active management and

conservation of the species throughout its range, which have aided in the recovery of the species and its habitat. Overall, the majority of red-cockaded woodpecker populations are managed under plans that address population enhancement and habitat management to sustain or increase populations and to meet the 2003 recovery plan objectives for primary core, secondary core, and essential support populations (USFWS 2003, pp. 156–159). Our revised proposed 4(d) rule does not invalidate or replace these successful programs. In fact, the revised proposed 4(d) rule would continue to encourage private landowners to participate in the safe harbor agreement program and would provide incentives for public land managers and applicable State land management agencies to continue providing specific management for the benefit of the species and its habitat.

The provisions of this revised proposed section 4(d) rule are only one of the many tools the Service can use to promote the conservation of the red-cockaded woodpecker. For example, if this 4(d) rule is finalized, private landowners and some State agencies may still pursue regulatory flexibility through existing mechanisms that currently promote the species' conservation, such as safe harbor agreements or habitat conservation plans. These effective mechanisms would continue to provide considerable assurances for landowners.

Similarly, this 4(d) rule would not change a private landowner's ability to enroll in Natural Resources Conservation Service or Partners for Fish and Wildlife conservation programs. These Federal programs provide technical and financial assistance to private landowners to support habitat management on working lands that will benefit wildlife and other natural resources in the open-pine systems of the southeastern United States. Nationwide, these programs help conserve or restore hundreds of thousands of acres of wildlife habitat every year (USFWS 2020b, p. 4). As a result of the consultations these Federal programs conduct with the Service, enrolled private landowners already receive allowances for incidental take associated with beneficial conservation practices, without

having to embark on a complex permitting process; the reclassification of the red-cockaded woodpecker and the revised proposed 4(d) rule, if finalized, would not alter these programs. We encourage private landowners to continue participating in these valuable private lands conservation programs.

Rules under 4(d) of the Act do not and cannot remove Federal agencies' section 7 consultation obligations (see "Implications for Implementation," below). While this revised proposed 4(d) rule may facilitate a streamlined consultation for beneficial habitat management projects, Federal agencies would still consult under section 7 of the Act if their actions may affect red-cockaded woodpeckers. Specifically, Federal agencies can consult with the Service regarding their project to minimize effects to the red-cockaded woodpecker and, if needed, the Service would develop a biological opinion and accompanying incidental take statement that exempts the Federal agency from the prohibitions in the 4(d) rule, for a specific amount of incidental take, while carrying out their planned project.

Finally, this revised proposed 4(d) rule would not alter or invalidate the 2003 red-cockaded woodpecker recovery plan. Recovery plans are not regulatory documents, but rather they provide a strategy to guide the conservation and recovery of the red-cockaded woodpecker. While this revised proposed 4(d) rule does not incorporate certain specific guidelines from the 2003 recovery plan (e.g., survey protocols, training requirements for acquiring a section 10(a)(1)(A) permit to monitor the species), as suggested by some commenters, these provisions may still be applicable under the 4(d) rule.

This revised proposed 4(d) rule would apply only when and if we make a final determination that the red-cockaded woodpecker should be reclassified as a threatened species. Finally, if finalized, the only portion of this document that would have regulatory effect is the text presented below under **Proposed Regulation Promulgation** (i.e., the text we propose to add as paragraph (h) of § 17.41 of title 50 of the Code of Federal

Regulations (CFR) (50 CFR 17.41(h)); the explanatory text above and in *Provisions of the Revised Proposed Section 4(d) Rule* below merely clarifies the intent of these proposed amendments to the regulations.

#### *Provisions of the Revised Proposed Section 4(d) Rule*

##### Prohibitions

In the October 8, 2020, proposed downlisting rule (85 FR 63474), the Service proposed specific provisions that prohibited incidental take associated with activities that would result in the further loss or degradation of red-cockaded woodpecker habitat, including damage to or loss of cavity trees, among other practices, to specifically protect the species' key habitat needs. However, comments submitted by the general public, Federal agencies, and the States during the public comment period on the October 8, 2020, proposed rule expressed confusion regarding these provisions. Many commenters believed the Service was prohibiting the activities it referenced in the proposed 4(d) rule. For example, commenters believed the Service was prohibiting all use of herbicides in habitat management, given the prohibition on incidental take that resulted from herbicide use. The Service's intent in the October 8, 2020, proposed rule was to prohibit incidental take that results from certain types of habitat management and land use, not to prohibit the activities themselves. However, given this confusion regarding the language in the October 8, 2020, proposed rule, this revised proposed rule describes prohibitions in a different, but more familiar, way.

Consistent with the discretion provided by section 4(d), our revisions to the proposed section 4(d) rule would provide for the conservation of the red-cockaded woodpecker by adopting the same prohibitions that apply to an endangered species under section 9 of the Act and 50 CFR 17.21. These are the same prohibitions that currently apply to the red-cockaded woodpecker while it is listed as an endangered species. Specifically, except as otherwise authorized or permitted, this revised proposed 4(d) rule

would continue to prohibit: Importing or exporting red-cockaded woodpeckers; take of red-cockaded woodpeckers; possession and other acts with unlawfully taken specimens; delivering, receiving, transporting, or shipping red-cockaded woodpeckers in interstate or foreign commerce in the course of commercial activity; and selling red-cockaded woodpeckers or offering red-cockaded woodpeckers for sale in interstate or foreign commerce. As they do now, these prohibitions would apply throughout the species' range, on both public and private lands. Over the past four decades, while the species was listed as an endangered species, these prohibitions have provided an understandable, broadly accepted framework for protecting red-cockaded woodpeckers and the habitat resources upon which they depend.

Identical to the regulations that apply under endangered status, the prohibitions in this revised proposed section 4(d) rule would prohibit all forms of take of red-cockaded woodpeckers within the United States. Under the Act, "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The Service has further defined the terms "harm" and "harass" in regulation (50 CFR 17.3). To "harm" entails an act which actually kills or injures fish or wildlife (50 CFR 17.3). Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering (50 CFR 17.3). To "harass" involves an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering (50 CFR 17.3). Take can result knowingly or otherwise, by direct and indirect impacts, and intentionally or incidentally.

As discussed in the SSA report for the species, effective monitoring, research, and translocation are an important element of the active management that promotes red-



cockaded woodpecker conservation and recovery. However, in this revised proposed section 4(d) rule, we propose to prohibit all forms of take, which would include capturing, handling, and similar activities. Such activities include, but are not limited to, translocation, banding, collecting tissue samples, and research involving capturing and handling red-cockaded woodpeckers. While these activities are essential to conservation and recovery of the species, there are proper techniques to capturing and handling birds that require training and experience. Improper capture, banding, or handling can cause injury or even result in death of red-cockaded woodpeckers. Therefore, to assure these activities continue to be conducted correctly by properly trained personnel, the proposed section 4(d) rule would continue to prohibit take associated with translocation, banding, research, and other activities that involve capture or handling of red-cockaded woodpeckers; however, take that results from these activities could still be allowed under a section 10(a)(1)(A) permit.

In essence, this rule would prohibit take under all circumstances, unless otherwise excepted in the section 4(d) rule (discussed below), authorized by a permit under the Act (e.g., section 10(a)(1)(A) permit issued for a safe harbor agreement, section 10(a)(1)(B) permit issued for a habitat conservation plan), or exempted through section 7 consultation (including the consultations that cover landowners enrolled in Natural Resources Conservation Service or Partners for Fish and Wildlife conservation programs). Because the prohibitions in this proposed rule exactly match those that currently apply under endangered status, if managers (e.g., landowners, Federal agencies, utility companies) are currently carrying out compatible land use activities without resulting in take of the species, the provisions in this proposed rule would not affect their ability to continue conducting those activities; this 4(d) rule also would not alter Federal agencies' current and continued obligation to conduct necessary section 7 consultation on these activities.

Prohibiting all forms of take on both public and private lands will provide clear

measures necessary and advisable to ensure the species continues to maintain or improve its demographics. Regulating both intentional and incidental take would help preserve the species' remaining populations and decrease synergistic, negative effects from other stressors, while allowing beneficial activities that do not result in take to continue to occur. The Service seeks comments on these prohibitions (see **Information Requested**, above).

#### Exceptions

The revised proposed section 4(d) rule would also provide for the conservation of the species by promulgating exceptions to the prohibitions discussed above; these exceptions would allow for routine law enforcement activities, for defense of life, to aid sick or injured birds, and for incidental take associated with the active habitat management this species uniquely requires. These exceptions would promote the maintenance and restoration of the habitat resources (cavity trees, nesting habitat, and foraging habitat) crucial to red-cockaded woodpecker recovery and conservation.

At the outset, the revised proposed section 4(d) rule outlines several standard exceptions to the prohibitions that are identical to exceptions that currently apply to the red-cockaded woodpecker and other endangered species. First, we propose to except certain actions that may be otherwise prohibited by this rule but that are authorized by permits under 50 CFR 17.32. Currently, activities that are prohibited by 50 CFR 17.21, which applies to endangered species, may be permitted by permits issued under 50 CFR 17.22 for the red-cockaded woodpecker. Accordingly, the inclusion of this provision referencing 50 CFR 17.32 does not result in a change from the status quo. This means that if a manager has received or receives a permit for a particular activity (e.g., a section 10(a)(1)(A) permit for monitoring red-cockaded woodpeckers; a permit issued for a safe harbor agreement or habitat conservation plan), any take that occurs as a result of activities covered by this permit would remain exempted from the aforementioned

prohibitions on take; in other words, the manager would not be liable for any take for which they already have a permit, as long as they continue to comply with the stipulations in the permit. This exception also applies to the permits that private landowners or some State agencies already hold as a result of a safe harbor agreement or habitat conservation plan. This revised proposed section 4(d) rule would not invalidate any part of a landowner's existing safe harbor agreement, habitat conservation plan, or permit. We encourage landowners to continue operating within the parameters of their safe harbor agreement, habitat conservation plan, and associated permits. As long as landowners continue to comply with the provisions of these permits, any take that occurs as a result of covered activities would be exempted from the prohibitions on take in this rule.

Furthermore, the Service encourages landowners to continue to enroll in the safe harbor agreement program. Exactly like the regulatory regime that applies while the species is listed as endangered, any new permits issued under the authority of the safe harbor agreement program would provide landowners with additional management flexibility and exemption from some of the take prohibitions in this proposed rule. Safe harbor agreements are partnerships between landowners and the Service or between the State and the Service involving voluntary agreements under which the property owners receive formal regulatory assurances from the Service regarding their management responsibilities in return for contributions to benefit the listed species.

For the red-cockaded woodpecker, this includes voluntary commitments by landowners to maintain and enhance red-cockaded woodpecker habitat to support baseline active clusters, which is the number of clusters at the time of enrollment, and to bolster their populations with additional above-baseline active clusters that emerge in response to beneficial management. Beneficial management includes the maintenance and enhancement of existing cavity trees and foraging habitat through activities such as

prescribed fire, mid-story thinning, seasonal limitations for timber harvesting, and management of pine stands to provide suitable foraging habitat and cavity trees. Permits issued under safe harbor agreements allow enrolled landowners to return their properties to “baseline” conditions at any time. Since its inception in the 1990s, the safe harbor program has successfully promoted the recovery of red-cockaded woodpeckers; due to the concerted efforts of private landowners enrolled in the program, the number of red-cockaded clusters on private lands has increased. As described in the proposed downlisting rule (85 FR 63474; October 8, 2020), 12 populations with 342 active clusters reside entirely on private lands, of which 10 populations with 295 active clusters are managed by landowners enrolled in the safe harbor agreement program. There currently are 241 active above-baseline clusters in the program. This revised proposed section 4(d) rule would not alter this valuable program or the permits associated with it.

Second, we propose to incorporate standard exceptions that currently apply to the red-cockaded woodpecker and endangered species, including exceptions that allow take in defense of life; allow take by an employee of the Service, Federal land management agency, or State conservation agency to aid sick or injured red-cockaded woodpeckers, dispose of dead specimens, or salvage dead specimens for scientific research; and allow individuals to take the species if they have a valid migratory bird rehabilitation permit if such action is necessary to aid a sick, injured, or orphaned listed migratory bird. We also propose a standard regulatory exception to allow Federal and State law enforcement officers to possess, deliver, carry, transport or ship individuals taken in violation of the Act as necessary in performing their official duties and that allow those with a valid migratory bird rehabilitation permit to possess or transport a listed migratory bird species. All of these standard exceptions currently apply while the species is listed as endangered, and they would continue to apply if we finalize the reclassification of red-cockaded woodpeckers to a threatened species with this revised proposed 4(d) rule.

Next, we propose to incorporate an exception that does not currently apply while the woodpecker is listed as endangered. This exception from 50 CFR 17.31(b) allows employees or agents of the Service or State conservation agencies operating under a cooperative agreement with the Service in accordance with section 6(c) of the Act to take red-cockaded woodpeckers in order to carry out conservation programs for the species. The Service can only apply the exception in 50 CFR 17.31(b) to take prohibitions for threatened species. The Service recognizes the special and unique relationship with our State conservation agency partners in contributing to conservation of listed species. States solely own and manage lands occupied by at least 31 demographic populations and oversee State-wide safe harbor agreements that have enrolled 459 non-Federal landowners covering approximately 2.5 million acres (85 FR 63474; October 8, 2020).

State agencies also often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Service in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Service shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, would be able to conduct activities designed to conserve the red-cockaded woodpecker that may result in otherwise prohibited take without additional authorization (i.e., without a permit). Most State conservation agencies within the range of red-cockaded woodpeckers have already worked with the Service to develop valid cooperative agreements under section 6(c) of the Act that include conservation programs for red-cockaded woodpeckers.

This exception is very similar to an exception that currently applies while the woodpecker is listed as endangered (the exception under 50 CFR 17.21(c)(5)). While the exception in 50 CFR 17.31(b) is similar to the exception that currently applies while the species is listed as endangered (50 CFR 17.21(c)(5)), it does not provide the same limitations on take associated with carrying out conservation programs in States' cooperative agreements. State agencies may also enroll in the safe harbor program to receive permits that allow for certain types of take, if they are not otherwise covered by a cooperative agreement or otherwise prohibited. The Service seeks comments on the inclusion of this exception (see **Information Requested**, above).

Finally, unlike the regulations that apply to the species under endangered status, we propose additional exceptions to the take prohibitions in this revised proposed 4(d) rule that would facilitate continued and increased implementation of beneficial management practices that contribute to the conservation of the species. As discussed above, active management targeted at maintaining and restoring red-cockaded woodpecker populations and habitat is essential to the continued recovery of the species. The analyses in the red-cockaded woodpecker SSA report illustrate that it could take “many decades...to attain a desired future ecosystem condition in which red-cockaded woodpeckers are no longer dependent on artificial cavities and related special treatments. Without adequate species-level management, in contrast to ecosystem management alone, very little increase in the number of moderately to very highly resilient populations can be expected, and small populations of low or very low resilience are unlikely to persist” (USFWS 2020a, p. 12). The species-specific exceptions in this revised proposed section 4(d) rule aim to facilitate management that would protect and enhance red-cockaded woodpecker populations.

Conservation of red-cockaded woodpeckers as a species depends primarily on the conservation of populations on Federal properties (e.g., National forests, DoD

installations) for several reasons. First, the vast majority of red-cockaded woodpeckers in existence today are on Federal lands (USFWS 2020a, pp. 106–108; see Table 7 in USFWS 2003, p. 137). Second, Federal properties contain most of the land that can reasonably be viewed as potential habitat for red-cockaded woodpeckers (USFWS 1985, p. 133). Third, existing Federal statutes, especially the Act, require that Federal agencies conserve listed species and maintain biodiversity within their lands. Section 2(c)(1) of the Act declares that it is the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species (16 U.S.C. 1531(c)(1)); the Act defines conservation as the use of all methods and procedures necessary to bring an endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary (16 U.S.C. 1532(3)). Private landowners, in contrast, can contribute substantially to conservation, but such contributions above complying with the statutory prohibitions (e.g., direct harm) are voluntary. For those private landowners that wish to increase the size of their population, we strongly encourage them to aim to achieve the recovery standard in the 2003 recovery plan or join the safe harbor program (USFWS 2003, pp. 188–189).

Therefore, the species-specific exceptions in this revised proposed 4(d) rule address private lands and Federal properties differently for three reasons. First, these entities have differing recovery responsibilities. Second, the Service would retain additional involvement in Federal agencies' habitat management activities as a result of section 7 consultation obligations. Third, there are other flexible programs that permit take that are already available to some State conservation agencies and private landowners (e.g., permits issued from safe harbor agreements and habitat conservation plans, Partners for Fish and Wildlife program, Natural Resources Conservation Service private landowner programs).

First, we propose an exception to the take prohibitions to allow incidental take on

DoD installations that occurs as a result of implementing red-cockaded woodpecker habitat management and military training activities detailed in Service-approved INRMPs. In this proposal, we define habitat management activities as activities intended to maintain or improve the quality and/or quantity of red-cockaded woodpecker habitat, including, but not limited to, prescribed burning; using herbicides and equipment to reduce midstory encroachment, thin overstocked pine stands, promote an open canopy pine system, and promote herbaceous groundcover; converting loblolly, slash, or other planted pines to more fire-tolerant native pines such as longleaf pine; planting and seeding native, site-appropriate pines and groundcover species; and regenerating areas of older pine forest, or any overrepresented age class, to increase and maintain sustainable current and future habitat.

Within the range of the species, most DoD Army, Air Force, and Marine Corps installations have red-cockaded woodpecker management plans and guidelines incorporated into their Service-approved INRMPs to minimize the adverse effects of the military training activities outlined in INRMPs and to achieve red-cockaded woodpecker recovery objectives. These plans and guidelines all contain an “Endangered Species Management Component” (ESMC) for red-cockaded woodpecker conservation, which includes population size objectives, management actions to achieve conservation goals, monitoring and reporting, and specific training activities that are allowed or restricted within clusters and near cavity trees. Under the Sikes Act (16 U.S.C. 670 *et seq.*), the Service is required to review and approve INRMPs, when they are revised, at least every 5 years, and participate in annual reviews. In addition to this review and approval under the Sikes Act, the Service conducts section 7 consultation under the Act on INRMPs and ESMCs to ensure DoD installations’ activities are not likely to jeopardize the continued existence of any listed species, including red-cockaded woodpeckers. If this revised proposed section 4(d) rule is finalized, DoD installations would still need to comply with



the Sikes Act requirement to obtain Service approval of INRMPs and would still need to fulfill their section 7 obligations under the Act, including tracking and reporting amounts of incidental take that occur as a result of activities outlined in the INRMP (see “Implications for Implementation,” below, for more detail on section 7 processes under section 4(d) rules).

In addition to excepting incidental take that results from red-cockaded woodpecker habitat management activities in INRMPs, this revised proposed section 4(d) rule would except incidental take associated with routine military training activities that are included in a Service-approved INRMP. The military training activities that DoD installations include in their INRMPs have been specifically designed to minimize incidental take of listed species, including red-cockaded woodpeckers. The DoD uses long-established guidelines (e.g., Management Guidelines for the Red-cockaded Woodpecker on Army Installations (U.S. Army 1996, entire)) to inform minimization measures that reduce incidental take associated with military training. Moreover, the DoD conducts section 7 consultation with the Service on the content of their INRMPs to ensure these military training activities will not jeopardize the species. Any incidental take resulting from new proposed training or construction activities that are not incorporated into a Service-approved INRMP would not be excepted under this proposed rule, but could be exempted through an incidental take statement associated with a biological opinion resulting from a separate section 7 consultation under the Act. In other words, if a military installation’s activities do not fall within the exceptions in this proposed 4(d) rule (i.e., they are not incorporated in a Service-approved INRMP) or are not otherwise covered in an existing section 7 biological opinion, incidental take that results from those activities could still be exempted from the prohibitions in this proposed 4(d) rule via a new biological opinion’s incidental take statement, as long as the activities will not jeopardize the continued existence of the species.

To further ensure the DoD continues to monitor their red-cockaded woodpecker populations and habitats, the provisions in the revised proposed section 4(d) rule would require each installation to share an annual property report regarding their red-cockaded woodpecker populations. This annual property report could include the property's recovery goal; the number of active, inactive, and recruitment clusters; information on habitat quality; and the number of artificial cavities the property installed. All military installations with red-cockaded woodpecker populations currently provide such a report to the Service, and we expect this to continue if we downlist the species. This monitoring could inform adaptive management and course corrections during annual INRMP reviews.

As a result of existing conservation programs under Service-approved INRMPs, red-cockaded woodpecker populations have increased on all DoD installations. In fact, Fort Bragg, Fort Stewart, Eglin Air Force Base, Fort Benning, and Camp Blanding all have achieved or surpassed their 2003 red-cockaded woodpecker recovery plan population size objectives and are expected to continue to manage towards larger populations (USFWS 2003, pp. xiii–xx, 212–213). Active and beneficial red-cockaded woodpecker management to increase population sizes on DoD installations has been an essential component of sustaining the species, and it can balance the effects of military training.

Some comments we received on the October 8, 2020, proposed downlisting rule (85 FR 63474) raised concerns this exception for Service-approved INRMPs could be too open-ended to be sufficiently protective of the species. However, given the close, formal involvement the Service has in reviewing and approving INRMPs under the Sikes Act, the species-specific beneficial management prescriptions that DoD installations must incorporate into the ESMCs of these plans, the monitoring that the DoD installations must conduct, and the section 7 consultation that would still occur for these plans to

ensure conservation activities do not jeopardize the species, we find that the management resulting from INRMPs would continue to advance the conservation of the species, even if incidental take occurs. Therefore, this revised proposed section 4(d) rule would except incidental take resulting from red-cockaded woodpecker habitat management and military training activities on DoD installations carried out in accordance with a Service-approved INRMP. The Service seeks comments on this exception (see **Information Requested**, above).

Second, we propose an exception to take prohibitions to allow incidental take that results from habitat management activities intended to restore or maintain red-cockaded woodpecker habitat on Federal land management agency properties; as noted earlier, we define “habitat management activities” for the purposes of the revised proposed 4(d) rule (see **Proposed Regulation Promulgation**, below). We provide this exception separately from the aforementioned exception for DoD properties to account for the fact that the Sikes Act requires a different level of Service involvement in the development of INRMPs and provides different standards for content in INRMPs than other Federal natural resource management planning processes.

In order to benefit from this exception, Federal land management agencies must detail these planned activities in a Federal habitat management plan that includes a red-cockaded woodpecker management component, which addresses factors including, but not limited to, the red-cockaded woodpecker population size objective and the habitat management necessary to sustain, restore, or increase foraging habitat, nesting habitat, and cavity trees to attain population size objectives. Suitable management plans may be stand-alone documents or may be step-down plans with red-cockaded woodpecker-specific management components that implement more general plans (e.g., the habitat management plans that implement the National Wildlife Refuge System’s comprehensive conservation plans and red-cockaded woodpecker-specific amendments to LRMPs). In

addition to describing these habitat management activities in a Federal habitat management plan, Federal land management agencies must also incorporate appropriate conservation measures to minimize or avoid adverse effects of these habitat management activities on red-cockaded woodpecker foraging habitat, on clusters, and on the species' roosting and nesting behavior to the maximum extent practicable; Federal agencies may identify these avoidance and minimization measures in these habitat management plans or in documentation associated with the section 7 consultation process. The inclusion of "clusters" in this provision would ensure Federal land managers are adequately protecting nesting habitat and cavity trees, in addition to foraging habitat, while executing their planned beneficial habitat management activities. The Service expects the red-cockaded woodpecker components of these Federal management plans to allow for adaptive management and frequent re-evaluation of appropriate conservation activities and minimization measures.

Moreover, to further ensure Federal land management agencies continue to monitor their red-cockaded woodpecker populations and habitats, the provisions in the revised proposed section 4(d) rule would require each Federal property to share an annual property report with the Service regarding their red-cockaded woodpecker populations. This annual property report could include the property's recovery goal; the number of active, inactive, and recruitment clusters; information on habitat quality; and the number of artificial cavities the property installed. All Federal properties with red-cockaded woodpecker populations currently provide such a report to the Service, and we expect this to continue if we downlist the species. The reporting Federal agencies provide as part of section 7 consultations would also qualify as this annual property report.

As a result of this proposed provision in the section 4(d) rule, we would, under certain conditions, except incidental take associated with habitat management activities on Federal lands that have short-term adverse effects to red-cockaded woodpeckers, but

that are intended to provide for improved habitat quality and quantity in the long term, with coinciding increases in numbers of red-cockaded woodpeckers, if these activities are detailed in a management plan that can adequately address site-specific considerations. Current and future red-cockaded woodpecker habitat conditions that require such restoration can vary significantly among sites and properties, to the extent that it would be extremely difficult to prescribe a universal condition by which this exception would apply. Therefore, in this section 4(d) rule, we propose that incidental take associated with these activities would be excepted, as long as the activities are intended to restore and maintain red-cockaded woodpecker habitat and are detailed in a Federal agency habitat management plan. These management plans can strategically and accurately assess the site-specific conditions. According to the revised proposed 4(d) rule, Federal agencies must also incorporate appropriate conservation measures to minimize the adverse effects of these activities on red-cockaded woodpecker foraging habitat, on clusters, and on the species' roosting and nesting behavior. Because Federal agencies will still need to complete section 7 consultation, as appropriate, on these habitat management plans or projects, the Service would have the opportunity to review these restoration projects and provide input on how to minimize impacts to the species.

Again, the Service seeks to encourage comprehensive, proactive management that results in red-cockaded woodpecker population growth and stability since, according to the 2003 recovery plan, "development and maintenance of viable recovery populations is dependent on restoration and maintenance of appropriate habitat" (USFWS 2003, p. 32). Continued conservation activities and beneficial land management are necessary to address the threats of habitat degradation and fragmentation, and it is the intent of this revised proposed rule to encourage these activities.

Most Federal properties within the range of the red-cockaded woodpecker already have management plans that detail habitat management activities specifically intended to

restore or maintain red-cockaded woodpecker habitat; this exception would not require these agencies to rewrite these management plans or to reinitiate section 7 consultation on these plans or on relevant projects. Moreover, because this revised proposed section 4(d) rule would not remove or alter the obligation of Federal agencies to complete section 7 consultation on their management plans, the Service would have the opportunity to review any major changes to these site-specific plans to ensure the Federal agency's habitat management activities are not likely to jeopardize the continued existence of any listed species, including the red-cockaded woodpecker. As part of this section 7 process, the Service would produce an incidental take statement for the estimated amount of take reasonably likely to occur as a result of the management plan's activities, even though that take would be excepted under the section 4(d) rule. Additionally, Federal agencies would still track all incidental take, even if it is excepted under this provision. If they exceed the amount of take in this incidental take statement as a result of carrying out the activities in their management plan, they would need to reinitiate consultation (see "Implications for Implementation," below, for more detail on section 7 processes under section 4(d) rules).

This provision would not except take that results from habitat management or other activities that provide no benefit to red-cockaded woodpecker recovery, even if these activities are also described in the Federal management plan; however, incidental take from such activities could still be exempted through an incidental take statement associated with a biological opinion resulting from section 7 consultation under the Act. In other words, if a Federal land management agency's activities cannot comply with the exceptions in this 4(d) rule, incidental take that results from those activities could still be exempted from the prohibitions in this 4(d) rule via a project-specific section 7 consultation, as long as the activities will not jeopardize the continued existence of the species. Finally, because the prohibitions in this revised proposed section 4(d) rule match

those that currently apply under endangered status, if Federal agencies are currently conducting management activities without resulting in take of red-cockaded woodpeckers, this rule would not affect their ability to continue conducting those activities, independent of this exception.

In short, if incidental take of red-cockaded woodpeckers occurs as a result of Federal land management agencies carrying out habitat management activities, as defined in the revised proposed rule, this take would not be prohibited, as long as: (1) The habitat management activities were implemented specifically to restore or maintain red-cockaded woodpecker habitat; (2) the Federal agency details these habitat management activities in a habitat management plan; (3) the Federal agency incorporates appropriate conservation measures to minimize or avoid adverse effects of these habitat management activities on red-cockaded woodpecker foraging habitat, on clusters, and on the species' roosting and nesting behavior to the maximum extent practicable; and (4) the Federal agency provides annual reporting to the Service. The Service seeks comments on this exception (see **Information Requested**, above).

Third, we include an exception to encourage private landowners who are not enrolled in the safe harbor agreement program to carry out specific compatible forest management activities (namely, prescribed burns and application of herbicides), given the importance of these forest management tools for red-cockaded woodpecker recovery (USFWS 2020a, p. 129). This provision would not change the measures in any existing safe harbor agreements or habitat conservation plans.

While Federal lands bear additional responsibility when it comes to achieving the recovery goals for red-cockaded woodpeckers, private lands still play an important role in the conservation of the species. They provide for connectivity between populations, which boosts resiliency, and support additional red-cockaded woodpecker clusters to enhance redundancy and representation of the species. This revised proposed section 4(d)

rule would continue to encourage voluntary red-cockaded woodpecker conservation on private lands through the successful safe harbor agreement program.

The proposed exception would further support compatible forest management on private lands, while continuing to maintain existing populations and would be especially relevant for landowners that do not currently participate in the safe harbor agreement program. This exception would except incidental take caused by application of prescribed burns or herbicides on private lands when compatible with maintaining any known red-cockaded woodpecker populations, provided that the landowner, or their representative:

- (1) Follows applicable best management practices for prescribed burns and applicable Federal and State laws;
- (2) applies herbicides in a manner consistent with applicable best management practices and applicable Federal and State laws, including Environmental Protection Agency label restrictions and herbicide application guidelines as prescribed by manufacturers; and
- (3) applies prescribed burns and herbicides in a manner that minimizes or avoids adverse effects to known active clusters and red-cockaded woodpecker roosting and nesting behavior to the maximum extent practicable.

The first condition on this provision requires landowners to follow applicable best management practices for prescribed burns. States and counties within the range of red-cockaded woodpecker provide guidance documents with these best management practices to ensure practitioners safely apply prescribed burns in a way that minimizes impacts to communities, riparian ecosystems, forest roads, and vegetation (e.g., North Carolina Forestry Best Management Practices Manual; Recommended Forestry Best Management Practices for Louisiana).

The third condition on this provision calls for private landowners to incorporate reasonable preventative measures to reduce any direct adverse effects of these activities on red-cockaded woodpeckers they already know to roost or nest on their property to the maximum extent practicable, increasing the net benefit that prescribed burns and



herbicide application can provide to red-cockaded woodpecker habitat and clusters. However, it does not require these private landowners to survey for new clusters prior to carrying out a burn or using herbicides, nor does it require them to follow particular preventative measures the Service prescribes, although the methods the Service outlines for cavity tree protection in its red-cockaded woodpecker recovery plan can provide a helpful resource to landowners when identifying practical ways to minimize adverse effects (USFWS 2003, pp. 201–205). Thus, this measure asks that landowners responsibly apply prescribed burns and herbicides, without being unreasonably prohibitive on landowners' compatible or beneficial activities.

This provision would also only be relevant in situations where take might occur as a result of a prescribed burn or the application of herbicides. For example, if a landowner does not currently have any red-cockaded woodpecker cavity trees, clusters, or foraging woodpeckers on their property, then it is not possible for these activities to result in incidental take. Thus, this landowner can proceed with prescribed burns or the use of herbicides without the possibility of violating the take prohibitions in the section 4(d) rule, because such activities would not result in take. It is only when a prescribed burn or the use of herbicides could result in incidental take of red-cockaded woodpeckers that private landowners may wish to take advantage of this exception by following best management practices and conducting activities in a manner that minimizes or avoids adverse effects to known active clusters and red-cockaded woodpecker roosting and nesting behavior to the maximum extent practicable. If a private landowner follows these best management practices and incorporates reasonable preventative measures while conducting prescribed burns and applying herbicides, while incidental take is unlikely, if it were to occur, the landowner would not be liable for such take under this proposed rule.

This provision would only except incidental take associated with prescribed burns or the use of herbicides when the use of these management practices are compatible with

maintaining any known red-cockaded woodpecker populations on their property; in other words, if a private landowner wishes to pursue a prescribed burn that could impair red-cockaded woodpecker population dynamics in the long term, this exception would not cover any incidental take that results from that burn, even if the landowner follows relevant best management practices.

Finally, if landowners are already enrolled in the safe harbor program, this exception would not provide any additional flexibility; the permits associated with safe harbor agreements authorize take associated with prescribed burns, herbicide use, and other activities, as long as landowners follow the stipulations in their safe harbor agreement and do not decrease the number of red-cockaded woodpecker clusters below their baseline.

The Service's intent for this provision is to provide a simple means by which to encourage private landowners to pursue certain types of voluntary forest management activities (i.e., prescribed burns and herbicide application) in a way that reduces impacts to the species but also removes any potential barriers to the implementation of this beneficial forest management, such as fear of prosecution for take. Collaboration with partners in the forestry industry and their voluntary conservation and restoration of red-cockaded woodpecker habitat has helped advance red-cockaded woodpecker recovery to the point of downlisting; this provision would continue to encourage this compatible or beneficial management. We also continue to encourage private landowners to participate in existing valuable conservation programs that promote forest management that benefits red-cockaded woodpeckers and provide take allowances for participating landowners through other means (e.g., permits issued as part of the safe harbor program or habitat conservation plans, Partners for Fish and Wildlife and Natural Resources Conservation Service private landowner programs, and the associated section 7 consultations these Federal programs conduct with the Service that provide allowances for incidental take

associated with beneficial conservation practices). The Service seeks comment on this exception (see **Information Requested**, above).

Finally, the proposed rule would except incidental take that occurs as a result of the installation of artificial cavities, as long as individuals conducting the installation have completed training, have achieved a certain level of proficiency as detailed below, and are following appropriate guidelines. As described above, maintaining an adequate number of suitable cavities in each woodpecker cluster is fundamental to the conservation of the species. Loss of natural cavity trees was a major factor in the species' decline, and availability of natural cavity trees currently limits many populations. Until a sufficient number of large, old pines becomes widely available, installation and maintenance of artificial cavities is an essential management tool to sustain populations and bring about population increases, and the Service continues to encourage the installation of artificial cavities. However, we also acknowledge that there are proper techniques to install cavity inserts, drill cavities, or install cavity restrictor plates, and these techniques require training and experience. Improperly installed artificial cavities can cause injury or even result in death of red-cockaded woodpeckers attempting to roost or nest in them. Currently, because the species is listed as endangered, individuals must seek a section 10(a)(1)(A) permit to install artificial cavity inserts, drilled cavities, or cavity restrictor plates.

However, we recognize that many of our partners have training and extensive experience in installing artificial cavities. Moreover, given the essential nature of artificial cavity installation for the continued conservation of the species, we find it is necessary and advisable for the section 4(d) rule to remove any potential hurdles to the efficient and effective provisioning and maintenance of artificial cavities. We, therefore, provide an exception to take prohibitions in this revised proposed rule for the installation, maintenance, and replacement of artificial cavity inserts and drilled cavities on public and

private lands. However, this exception would only apply if the individual conducting the installation has either held a valid Service permit for that purpose and has continued to install, maintain, and replace cavities since the expiration of their permit or has completed a period of apprenticeship under the direction of a person that has been involved in cavity installation for at least 3 years (the trainer).

In order to complete their training, under the direct supervision of the trainer, the apprentice must install at least 10 drilled cavities, if they plan to install drilled cavities, or 10 inserts, if they plan to install inserts, and learn the proper maintenance and inspection procedures for cavities and restrictor plates. After the apprentice has completed their training, the trainer must provide a letter to the apprentice and to the U.S. Fish and Wildlife Service Regional red-cockaded woodpecker recovery coordinator; the letter would outline the training the apprentice received and would serve as a record of the apprentice's training.

Additionally, the individual conducting the installation must follow appropriate guidelines for the installation and use of artificial cavity inserts and drilled cavities, including: (1) Monitoring the cavity resource; (2) installing and maintaining the recommended number of suitable cavities in each cluster; (3) using the appropriate type of artificial cavity insert and method of artificial cavity installation; (4) installing artificial cavities as close to existing cavity trees as possible, preferably within 71 meters (200 feet); (5) selecting a tree that is of appropriate age or diameter when installing a cavity insert; (6) selecting the appropriate location for artificial cavity installation on the tree; and (7) protecting red-cockaded woodpeckers from sap leakage by ensuring that no artificial cavity has resin leaking into the chamber or entrance tunnel.

The 2003 red-cockaded woodpecker recovery plan can provide some additional detail on how an installer can ensure they successfully follow these guidelines (USFWS 2003, pp. 175–178). If an installer does not comply with the qualification requirements

(i.e., they have not held a valid Service permit or they have not completed the necessary training) or installation guidelines in the proposed 4(d) rule and incidental take occurs as a result of artificial cavity installation, the installer would still be liable for this take. However, if an installer is qualified and follows the installation guidelines, while incidental take is highly unlikely, if it were to occur, the installer would not be liable for such take under this proposed rule. We included this exception in our revised proposed 4(d) rule as a result of public comments on the October 8, 2020, proposal that supported its incorporation. The Service seeks comments on this exception (see **Information Requested**, above).

In addition to the exceptions we outline above, we may issue permits to carry out activities that could result in otherwise prohibited take of threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

#### Implications for Implementation

Nothing in this revised proposed section 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act; the consultation requirements under section 7 of the Act, as noted above; or the ability of the Service to enter into partnerships for the management and protection of the red-cockaded woodpecker. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service, where appropriate.

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

As a result of these provisions in the Act, if a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, Federal Emergency Management Agency, Natural Resources Conservation Service, or Partners for Fish and Wildlife Program). Federal actions that do not affect listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

The trigger for consultation is whether a Federal action may affect a listed species or its critical habitat, not whether the action would result in prohibited take; species-specific section 4(d) rules, regardless of the take they prohibit or allow, cannot change this requirement to consult. Consultation is still required to satisfy the requirements of section 7(a)(2) of the Act to ensure that the activity will not jeopardize the species or result in adverse modification of critical habitat. Thus, if a Federal agency determines

that their action is not likely to adversely affect a listed species or its critical habitat, they must still receive the Service's written concurrence, even if this activity is excepted under a section 4(d) rule. If a Federal agency determines that their action is likely to adversely affect a listed species or its critical habitat, even if it only results in take that is excepted under a section 4(d) rule, they must still pursue formal consultation with the Service and the Service must formulate a biological opinion that includes an incidental take statement. Even if a section 4(d) rule includes specific exceptions to take prohibitions, the Service must still describe or enumerate the amount or extent of this incidental take that is reasonably certain to occur (i.e., in an incidental take statement) and the Federal action agency must monitor and report any such take that occurs. If an action agency's activities exceed the amount of incidental take enumerated in the incidental take statement, it would trigger reinitiation of the consultation, even if this excessive take is still excepted under the section 4(d) rule (see *Center for Biological Diversity v. Salazar*, 695 F.3d 893 (2012)). This allows the agency to keep track of any take to stay abreast of the status of the species. The Federal action agency may also trigger reinitiation of consultation if they do not implement the proposed action as described in the biological opinion or as directed in the section 4(d) rule.

Even though section 4(d) rules do not remove or alter Federal agencies' section 7 consultation obligations, a section 4(d) rule can facilitate simplification of formal consultations. For example, as noted in our August 27, 2019, final rule regarding prohibitions for threatened species (84 FR 44753), in choosing to except take under certain circumstances in a section 4(d) rule, the Service has already determined that these forms of take are compatible with the species' conservation, which can streamline our analysis of whether an action would jeopardize the continued existence of the species, making consultation more straightforward and predictable. The Service plans to develop tools to streamline formal consultation for activities that do not result in prohibited take

of red-cockaded woodpeckers. For example, given the nature of activities that would be consistent with this revised proposed section 4(d) rule, and as the revised proposed section 4(d) rule includes an explanation for why such activities provide for the conservation of the species, the Service could draft an analysis of the effects of these habitat management activities on the species for inclusion in all section 7 analyses that consider effects on the red-cockaded woodpecker. This analysis could be inserted verbatim into any Service biological opinion (or action agency biological assessment), thereby creating efficiencies in the development of these documents and providing consistency for consultation on activities that are covered by the section 4(d) rule.

Finally, if Federal agencies have already completed section 7 consultation on particular projects, activities, or management plans and the biological opinion remains valid, they do not need to reinitiate consultation if or when this 4(d) rule is finalized, if their Federal action (e.g., management plan) has not changed. However, given the provisions in this revised proposed section 4(d) rule, Federal agencies may find that reinitiating consultation, although not required, could grant additional flexibilities for their management.

We will consider tools to streamline section 7 consultation on activities that may result in take that is excepted under this revised proposed 4(d) rule. We ask the public, particularly Federal and State agencies and other interested stakeholders that may be affected by the proposed section 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that the Service could provide or use, respectively, to streamline the implementation of this proposed section 4(d) rule (see **Information Requested**, above).

## **References Cited**

A complete list of references cited in this document is available on the Internet at <https://www.regulations.gov> and upon request from the person listed under **FOR**



## **FURTHER INFORMATION CONTACT**, above.

### **Authors**

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Louisiana, Georgia, and South Carolina Ecological Services Field Offices.

### **List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

### **Proposed Regulation Promulgation**

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended on October 9, 2018, at 83 FR 50560, and October 8, 2020, at 85 FR 63474, as set forth below:

## **PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. Amend § 17.41 by revising paragraph (h) to read as follows:

### **§ 17.41 Special rules—birds.**

\* \* \* \* \*

(h) Red-cockaded woodpecker (*Dryobates borealis*). (1) *Definitions*. For the purposes of this paragraph (h), we define the following terms:

(i) *Habitat management activities* are activities intended to maintain or improve the quality and/or quantity of red-cockaded woodpecker habitat, including, but not limited to, prescribed burning; using herbicides and equipment to reduce midstory encroachment, thin overstocked pine stands, promote an open canopy pine system, and promote herbaceous groundcover; converting planted pines to more fire-tolerant, site-

appropriate native pines found within the associated native pine, fire-dependent ecosystem; planting and seeding native, site-appropriate pines and groundcover species; and regenerating areas of older pine forest to increase and maintain sustainable current and future habitat for red-cockaded woodpeckers.

(ii) *Cavity tree* means any tree containing one or more active or inactive natural or artificial cavities.

(A) An *active cavity* is a completed natural or artificial cavity or cavity start exhibiting fresh pine resin associated with red-cockaded woodpeckers' cavity maintenance, cavity construction, or resin well excavation.

(B) An *inactive cavity* is a cavity that is not presently being used by red-cockaded woodpeckers.

(C) A *cavity start* is a void formed in the bole of the tree during the initial stages of cavity excavation and can be active or inactive.

(iii) *Cluster* means the aggregation of cavity trees within an area previously or currently used and defended by a single red-cockaded woodpecker group. A cluster may be active or inactive. A cluster encompasses the minimum convex polygon containing all of a group's cavity trees and the 61-meter (200-foot) buffer surrounding that polygon. The minimum cluster area size is 4.05 hectares (10 acres), as some clusters may contain only one cavity tree.

(A) An *active cluster* is defined as a cluster in which one or more of the cavity trees exhibit fresh resin as a result of red-cockaded woodpecker activity or in which one or more red-cockaded woodpeckers are observed.

(B) An *inactive cluster* is defined as a cluster that is not currently supporting any red-cockaded woodpeckers and shows no evidence of red-cockaded woodpecker activity.

(C) A *group* is a red-cockaded woodpecker social unit, consisting of a breeding pair with one or more helpers, a breeding pair without helpers, or a solitary male.

(iv) *Foraging habitat* is habitat that generally consists of mature pines with an open canopy, low densities of small pines, a sparse hardwood and/or pine midstory, few or no overstory hardwoods, and abundant native bunchgrass and forb groundcovers.

(2) *Prohibitions*. The following prohibitions in this paragraph (h)(2) that apply to endangered wildlife also apply to the red-cockaded woodpecker. Except as provided under paragraphs (h)(3) and (4) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(iv) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(3) *General exceptions from prohibitions*. In regard to this species, you may:

(i) Conduct activities as authorized by a permit issued under § 17.32, such as permits associated with safe harbor agreements and habitat conservation plans.

(ii) Take, as set forth at § 17.21(c)(2) through (4) for endangered wildlife, and § 17.21(c)(6) and (7) for endangered migratory birds.

(iii) Take, as set forth at § 17.31(b).

(iv) Possess and engage in other acts with unlawfully taken red-cockaded woodpeckers, as set forth at § 17.21(d)(2) for endangered wildlife, and § 17.21(d)(3) and (4) for endangered migratory birds.

(4) *Exceptions from prohibitions for specific types of incidental take*. The

following activities that cause take that is incidental to an otherwise lawful activity are not in violation of the prohibitions:

(i) *Department of Defense (DoD) installations.* Red-cockaded woodpecker habitat management and military training activities on DoD installations carried out in accordance with a U.S. Fish and Wildlife Service (Service)-approved integrated natural resources management plan, provided that the DoD installation reports annually to the Service regarding their red-cockaded woodpecker populations.

(ii) *Federal land management agency properties.* Habitat management activities intended to restore or maintain red-cockaded woodpecker habitat on Federal land management agency properties, provided that:

(A) The Federal land management agency details these habitat management activities in a Federal habitat management plan;

(B) The Federal habitat management activities incorporate appropriate conservation measures to minimize or avoid adverse effects of these habitat management activities on red-cockaded woodpecker foraging habitat, on clusters, and on the species' roosting and nesting behavior to the maximum extent practicable; and

(C) The Federal land management agency reports annually to the Service regarding their red-cockaded woodpecker populations.

(iii) *Privately owned properties.* Application of prescribed burns or herbicides on private lands when compatible with maintaining any known red-cockaded woodpecker populations, provided that the landowner or their representative:

(A) Follows applicable best management practices for prescribed burns and applicable Federal and State laws;

(B) Applies herbicides in a manner consistent with applicable best management practices and applicable Federal and State laws, including Environmental Protection Agency label restrictions and herbicide application guidelines as prescribed by

manufacturers; and

(C) Applies prescribed burns and herbicides in a manner that minimizes or avoids adverse effects to known active clusters and red-cockaded woodpecker roosting and nesting behavior to the maximum extent practicable.

(iv) *Artificial cavities.* Installation, maintenance, and replacement of artificial cavity inserts and drilled cavities on public and private lands, provided that:

(A) The individual conducting the installation, maintenance, or replacement has either:

(1) Held a valid Service permit for that purpose in the past and has continued to install, maintain, and replace cavities since the expiration of their permit; or

(2) Completed the following training procedures for the type of artificial cavity they plan to install, maintain, or replace:

(i) The individual (“apprentice”) has completed a period of apprenticeship to learn proper installation, maintenance, and replacement procedures for artificial cavities under the direction of a person (“trainer”) who has been actively installing, maintaining, and replacing cavities for at least the past 3 years;

(ii) The apprentice has installed at least 10 drilled cavities or 10 inserts under direct supervision of the trainer; and

(iii) The apprentice has learned the proper maintenance and inspection procedures for cavities and restrictor plates.

(B) If the individual conducting the installation is an apprentice, the apprentice’s trainer provides a letter to the apprentice and to the Service red-cockaded woodpecker recovery coordinator that outlines the training the apprentice received, which will serve as a record of the apprentice’s training.

(C) The individual conducting the installation follows appropriate guidelines for the installation and use of artificial cavity inserts and drilled cavities, including, but not

limited to:

- (1) Monitoring the cavity resource;
- (2) Installing and maintaining the recommended number of suitable cavities in each cluster;
- (3) Using the appropriate type of artificial cavity insert and method of artificial cavity installation;
- (4) Installing artificial cavities as close to existing cavity trees as possible, preferably within 71 meters (200 feet);
- (5) Selecting a tree that is of appropriate age or diameter, when installing a cavity insert;
- (6) Selecting the appropriate location for artificial cavity installation on the tree; and
- (7) Protecting red-cockaded woodpeckers from sap leakage by ensuring that no artificial cavity has resin leaking into the chamber or entrance tunnel.

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